

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
INTERNATIONAL ACTIVITIES

September 17, 1987

Mr. A. Dionne
Coordinator, TDG Pr program
Waste Management Division.
Industrial Programs Division
Environment Canada.
Ottawa, Ontario K1A 0H3
Canada

Dear Mr. Dionne:

This is in response to your letter August 28, 1987, which encloses a letter from Mr. Steven Shrybman to Minister McMillan concerning the import of spent batteries into Canada.

It is our understanding based on information you have provided to us that the batteries being imported from the U.S. to a facility in Toronto are "whole" batteries which have not been subjected to any part of a reclamation process in the United States. Because no reclamation has taken place, under the RCRA regulations of 40 CFR, Subpart G, Section 266.50, these batteries are not subject to the RCRA manifest system which also therefore exempts from them notification requirements of Section 3017 of RCRA. However, if in the future some aspect of reclamation does take place (e.g., removal of plates), the batteries would be subject to regulation under Parts 262 through 266 or Parts 270 or 124, and they would be subject to manifesting for transport. This in turn would require notification of export under Section 3017. However, as long as the batteries remain whole and excluded from the manifest system, EPA cannot legally require prior notification of export.

I hope this information is helpful to you.

Sincerely,

Wendy Grieder
International Activities Specialist

FaxBack# 11294

**Environment
Canada**

**Conservation and
Protection**

Ottawa, Ontario
K1A 0H3

August 28, 1987

Ms. Wendy Grieder
Office of International Activities
Environmental Protection Agency
401 M. Street S.W.
Mail Drop A106
Washington, D.C. 20460
U.S.A.

Dear Ms. Grieder:

re: Shipment of Spent Lead-Acid Batteries from the U.S. to Ontario

Please find attached a 1987, sent to Environment Canada Association concerning the above copy of the letter dated August 14, by the Canadian Environmental Law subject. We would appreciate If you could review and confirm the accuracy of the information concerning your legislation, stated in Mr. Shrybman's letter.

An early reply would be much appreciated. Thank you for your collaboration.

Yours sincerely,

A. Dionne
Coordinator, TDG Program
Waste Management Division
Industrial Programs Branch

c.c. J. Myslicki

Attach.

Canadian Environmental Law Association
L'Association canadienne du droit de l'environnement

243 Queen Street W., 4th Floor, Toronto, Ontario M5V 1Z4, telephone (416) 977-2410

August 14, 1987

The Honorable Tom McMillan
Minister of the Environment
28th Floor, 10 Wellington Street
Terrasses de la Chaudiere
Hull, Quebec
K1A 0H3

Dear Mr. Minister:

Re: Cross-Border Shipments of U.S. Lead Acid Batteries

We were very concerned to read in the press of your response to our correspondence concerning cross-border shipments of lead acid batteries. we reiterate our contention that such shipments are unlawful if made without the prenotification and consent required by the Resources Conservation and Recovery Act (RCRA) and a bilateral agreement entered into between the United States and Canada in November of 1986. The following is offered in support of our position.

Prenotification and Consent Must Be Given With Respect to Cross-Border Shipments of Hazardous Waste

Article 3(1) of Canada's agreement with the United States provides:

1. The designated authority of the Country of export shall notify the designated authority of the Country of import of proposed transborder shipments of hazardous waste, as that term is defined in the Country of export.

And sub-paragraphs 3 and 4 of the same Article further provide:

3. The designated authority of the Country of import shall have 45 days from the postmark date of the notice provided pursuant to paragraph 1 of this article within which to respond to such notice, indicating its consent (with or without conditions) or its

objection to the export. Such response shall be transmitted to the designated authority of the Country of export via diplomatic channels.

4. If no response is received by the designated authority of the Country of export within the 45-day period described in paragraph 3 of this article, the Country of import shall be deemed to have consented to the export of hazardous waste described in the notice.

The provisions of our agreement with the United States substantially replicate the requirements of Section 3017 of RCRA, which provides as follows:

- (a) In General, beginning twenty-four months after the date of enactment of the hazardous and Solid Waste Amendments of 1984, no person shall export any hazardous waste identified or listed under the subtitle unless -
 - (1) (A) Such person has provided the notification required in subsection (C) of this section,
 - (B) The government of the receiving country has consented to accept such hazardous waste,
 - (C) A copy of the receiving country's written consent is attached to the manifest accompanying each waste shipment, and
 - (D) The shipment conforms with the terms of the consent of the government of the receiving country required pursuant to subsection (e), or
 - (2) The United States and the government of the receiving country have entered into an agreement as provided for in sub-section (F) and the shipment conforms with the terms of such agreement.

Therefore, if spent lead acid batteries are hazardous waste under U.S. law, then prenotification and consent must be given before shipments can be lawfully made.

Spent Lead Acid Batteries Are Hazardous Waste Under U.S. Law

In our view, regulations under Part 40 of the U.S. Consolidated Federal Regulations (CFR), make it clear that spent batteries are hazardous waste subject to the export requirements of RCRA and our agreement with the U.S. Unless exempted by Part 261.4 "solid waste is hazardous waste" even if intended for reuse, recycling, or reclamation, provided the waste is either identified by name on the EPA's list of hazardous waste, or fails prescribed tests for ignitability, corrosivity, reactivity, or toxicity. Both U.S. regulatory officials and Mr. Bob Breeze, of the Ontario Ministry of the Environment, have confirmed that batteries would fail hazardous waste tests with respect to corrosivity and toxicity. Therefore, spent batteries are hazardous waste under U.S. law.

Apparently, some confusion has arisen because sub-part "G" of CFR part 266.80 provides that "persons who generate, transport, or collect spent batteries, or who store spent batteries but do not reclaim them, are not subject to regulation under parts 262 - 266 or parts 270 or 124 of this chapter, and they are also not subject to the requirements of section 3010 of RCRA". However, the exemptions given generators and transporters do not extend to the requirements of section 3017, the export provisions of RCRA. Conversations with U.S. EPA officials have confirmed our reading of these statutory requirements.

Therefore it is quite clear, in our view, that both the export requirements of our agreement with the United States and of U.S. Federal law apply to cross-border shipments of lead acid batteries.

We are also assured that our interpretation is correct because of the following facts and circumstances:

1. On July 13, 1987, Mr. Tony Dionne, of Environment Canada, confirmed, after consulting with U.S. regulatory officials, that the export requirements of U.S. legislation and our bilateral agreement with the United States apply to cross-border shipments of lead acid batteries.
2. Prior to August 12, 1987, I had several conversations with U.S. EPA officials and on no occasion did they challenge the premise that the export regulations apply.

U.S. and Canadian Regulatory Practice Confirms the Need for Notice and Consent

Perhaps the most telling point, however, is that on May 28, 1987, a notice of proposed cross-border shipments of spent lead acid batteries was given by Frontier Chemical, a company that is apparently based in Niagara Falls, New York. This notice concerned proposed monthly shipments of batteries to the Tonolli Company of Canada, located near Toronto. We had been advised by Ms. Wendy Grieder, of the U.S. EPA, that the Ministry of the Environment raised objections or questions about these cross-border shipments before final approval was given on July 7, 1987. It seems quite clear then, that in the view of Environment Canada and the Ministry of the Environment, the export provisions of RCRA and our agreement with the United States apply with respect to transboundary shipments of lead acid batteries.

Spent Lead Acid Batteries Also Meet Current Hazardous Waste Tests in Ontario

Finally, as to the proper characterization of lead acid batteries under Ontario law, it is clear that under Regulation 309 lead acid batteries are currently characterized as hazardous waste, a matter confirmed by Mr. Bob Breeze, of the Ministry. While the Ministry has in the works amendments to Regulation 309 that would mean less regulation for the generators and transporters of such batteries, those amendments are not yet approved and the law, as it presently stands, is very clear.

We trust that upon reviewing the facts and circumstances that we have related, you will recognize that prenotification and consent is required with respect to all cross-border shipments from the United States of lead acid batteries. It would be appropriate, in our view, for you then to issue a clarification to the press on this point, and respond to our earlier correspondence accordingly.

Sincerely,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Steven Shrybman
Counsel